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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Hermelinda Prado as Personal  
Representative of the Estate of Pedro A.  
Rojas, Jr.,

Plaintiff,

v.

Corizon Health, Inc., et al.,

Defendants.

No. CV 19-04848-PHX-JAT (JZB)

**ORDER**

Plaintiff Hermelinda Prado, the personal representative of the estate of Pedro Rojas, Jr., who died while in custody of the Arizona Department of Corrections (“ADC”), brought this action under state law and 42 U.S.C. § 1983 against Corizon Health Care, Inc. (“Corizon”); Dr. Muhammed Haleem; Wellpath, LLC; and The GEO Group, Inc (“the Wellpath Defendants”). (Docs. 14, 16.)<sup>1</sup> Before the Court are Corizon’s Motion for Summary Judgment and Motion for Judgment on the Pleadings (Docs. 61, 68).

**I. Background**

Plaintiff’s claims arose while Rojas was confined in ADC custody. (Doc. 16 ¶ 20.) Plaintiff alleged that after Rojas sought medical care for digestive system issues, including rectal bleeding, Defendants treated him for hemorrhoids and an infection; however, they

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<sup>1</sup> Pedro A. Rojas, Jr., initiated this action in Maricopa County Superior Court, and Defendants removed the action to federal court. (Doc. 1, Maricopa County Superior Court No. CV 2019-006526.) After Rojas’ death in August 2019, Hermelinda Prado was substituted as Plaintiff. (Doc. 14.)

1 did not assess, examine, or diagnose Rojas properly, and they refused to send Rojas to a  
 2 specialist or hospital for proper assessment and examination. (*Id.* ¶ 21.) Rojas' condition  
 3 deteriorated, and, when he was finally admitted to a hospital in April 2017, he was  
 4 diagnosed with colon cancer. (*Id.* ¶¶ 21–23.) The cancer metastasized to his lungs, and,  
 5 in June 2019, Rojas died of cancer. (*Id.* ¶¶ 30–31.)

6 In Count One of the Amended Complaint, Plaintiff asserted a claim for negligence  
 7 and wrongful death against Dr. Haleem, Corizon, GEO Group, and Wellpath. (*Id.* ¶¶ 31–  
 8 41). In Count Two, Plaintiff asserted an Eighth Amendment medical care claim against  
 9 Dr. Haleem, Corizon, GEO Group, and Wellpath. (*Id.* ¶¶ 42–67.)

10 Corizon moves for summary judgment as to the claims against it on the grounds that  
 11 (1) Plaintiff has not produced standard-of-care-expert-witness testimony to support her  
 12 negligence claim; (2) Plaintiff cannot establish causation to support a negligence claim  
 13 against Corizon; and (3) Plaintiff cannot demonstrate deliberate indifference by Corizon.  
 14 (Doc. 61.)

15 Plaintiff did not file a response to Corizon's Motion for Summary Judgment.  
 16 Corizon then filed a Motion for Judgment on the Pleadings, that is effectively a motion for  
 17 summary disposition of the unopposed Motion for Summary Judgment. (Doc. 68.)

## 18 **II. Pending Motions**

19 In advance of the settlement conference held on April 27, 2022, Corizon jointly  
 20 moved to have expedited consideration of its Motion for Summary Judgment. Corizon  
 21 hoped to have a ruling in time to not participate in the settlement conference. The Wellpath  
 22 Defendants opposed this motion for expedited ruling advising the Court that Plaintiff and  
 23 Corizon had secretly entered into a settlement agreement thereby making Corizon's  
 24 pending Motion for Summary Judgment not a real controversy before the Court. Further,  
 25 the Wellpath Defendants indicated that to avoid Plaintiff arguing at trial that no portion of  
 26 comparative fault could be attributed to Corizon based on the Court's ruling on summary  
 27 judgment, the Wellpath Defendants wished to oppose the Motion for Summary Judgment  
 28 themselves.

Corizon replied and made three arguments: 1) the Wellpath Defendants themselves (if not their new counsel) have known of this settlement for some time and failed to timely raise this issue; 2) the Wellpath Defendants cite no law that the agreement between Plaintiff and Corizon is improper; and 3) that a request for summary disposition of a motion for summary judgment is appropriate if the motion is unopposed (Corizon cites only state law that is not directly on point for this third argument). (Doc. 78)

#### **A. Summary Disposition**

Turning to the third argument in the reply (Doc. 78), Corizon fails to cite directly contrary controlling Ninth Circuit precedent. Specifically, a party's failure to respond to a summary judgment motion is not a basis for a court to summarily grant the motion. *Heinemann v. Satterberg*, 731 F.3d 914, 917 (9th Cir. 2013) (Federal Rule of Civil Procedure 56 does not permit a court to grant summary judgment by default). If a summary judgment motion is unopposed, Federal Rule of Civil Procedure 56, which governs summary judgment, "authorizes the court to consider a fact as undisputed," but it does not permit the court to grant summary judgment by default. *Id.* And a court may only consider a movant's asserted fact if it is properly supported as required under Rule 56, regardless of whether the nonmovant responds or disputes the asserted fact. Indeed, if the movant fails to meet its initial burden of production, the opposing party need not respond or produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d 1099, 1102–03 (9th Cir. 2000).

For these reasons, the motion for summary disposition (captioned as a motion for judgment on the pleadings) is denied.

#### **B. Summary Judgment Motion**

In its second argument in the reply, Corizon argues that counsel for the Wellpath Defendants fails to offer any citation to support its argument that failing to disclose a secret settlement to the Court is improper. Attorneys are bound by their ethical obligations even if opposing counsel does not provide citations to those duties. Nonetheless, the Court will provide the citation: *In re Alcorn*, 41 P.3d 600, 614 ¶51 (Ariz. 2002) (suspending counsel

1 from the practice of law for six months due to the failure to disclose a secret settlement to  
2 the trial court).

3 In *Alcorn* the Arizona Supreme Court was very clear: “We hold today, as strongly  
4 as possible, that any agreement that has the *potential* of affecting the manner in which a  
5 case is tried is one that may encourage wrongdoing and must therefore be disclosed to the  
6 trial judge and all litigants in the case. Thus, Respondents did have a duty to disclose.” *Id.*  
7 at 608 ¶28. The Court further stated,

8 The judge is not just a casual observer of the passing scene but has important  
9 responsibilities in an adversarial system. While the judge is not a party as are  
10 litigants who produce evidence or argue the case, he or she is more than a  
11 referee presiding in a merely formal or ritualistic role. In an adversarial  
12 system, the judge is responsible for ensuring that justice is accomplished  
13 according to the substantive rules and procedural mechanisms established by  
14 law. Those procedural rules do not contemplate hoodwinking judges....  
While some things must be excluded from jurors’ consideration to focus their  
attention on matters legally relevant, the rules do not contemplate hiding the  
true nature of the proceeding from the judge. Nor do they permit lawyers to  
remain silent when it is evident that the judge has been misled about what is  
occurring in his own courtroom.

15 *Id.* at 608 ¶27.

16 Finally, there is some indication that the settlement between Corizon and Plaintiff  
17 was not yet fully consummated because it was dependent on this Court granting Corizon’s  
18 “unopposed” motion for summary judgment. However, the *Alcorn* Court rejected this  
19 concept as a basis to not disclose to the Court. Specifically, the *Alcorn* Court stated,

20 The agreement is, on its face, collusive. Any agreement by which one  
21 purported opponent must allow another to conduct a supposedly adversarial  
22 trial in any manner it wants is inherently collusive. If the adversary system  
23 means anything, it means that opposing parties will adopt a self-serving  
strategy.... the agreement was inherently collusive because it committed  
Respondents to further a scheme to use a seemingly adversarial trial for an  
improper purpose.

24 *Id.* 608-09 ¶30. Accordingly, even if the settlement in this case was not complete, counsel  
25 still had a duty to disclose it because it was inherently collusive. It was collusive because  
26 it allowed Corizon to attempt to get a Court order under misleading circumstances, which  
27 is using the Court’s authority for an improper purpose.  
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1           Thus, Wellpath’s counsel’s lack of citation is irrelevant to this Court’s conclusion  
2 that Corizon and Plaintiff’s failure to disclose this secret settlement was inappropriate and  
3 operated to use this Court’s record for an improper purpose.

4           Further the failure to disclose violated Local Rule Civil 40.2(d), which requires  
5 “When ... any motion is pending before a District Judge or Magistrate Judge and is  
6 voluntarily resolved by the parties or their counsel, it shall be the duty of counsel to inform  
7 the Clerk and the chambers of each such District Judge or Magistrate Judge immediately.”  
8 Here, Plaintiff failed to respond to the pending motion for summary judgment in December  
9 2021. Corizon moved for summary disposition in January 2022. Seemingly by the time  
10 of these two occurrences, these parties knew of their settlement. Yet no one advised the  
11 Court until counsel for the Wellpath Defendants did so in April 2022.

12           Thus, for all of the foregoing reasons the Court will not “rule” on the pending motion  
13 for summary judgment. The Court finds that the parties’ secret settlement in which  
14 Plaintiff agreed not to oppose the motion removed this motion from the adversarial system;  
15 therefore, any ruling by this Court would be improper. Accordingly, the motion will be  
16 denied. Further, because the dispositive motion deadline has expired, the Court will not  
17 consider another round of dispositive motions. Thus, Plaintiff and Corizon may either  
18 settle in the traditional-disclosed-on-the-record way or proceed to trial.

19           Because the Court will not consider the merits of the motion for summary judgment,  
20 the Court need not address the Wellpath Defendants’ request to respond to it. The Court  
21 also need not address Corizon’s arguments regarding when the Wellpath Defendants had  
22 notice of the settlement.

### 23 **III. Candor to the Tribunal (E.R. 3.3)**

24           Local Rule Civil 83.2(e) requires attorneys practicing before this Court to adhere to  
25 the Rules of Professional Conduct in the Rules of the Supreme Court for the State of  
26 Arizona. The Court has serious concerns that the behavior of counsel in this case has not  
27 complied with these Rules. However, the Court recognizes that the motion for expedited  
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1 ruling in which this issue was disclosed did not require full briefing, factually or legally,  
2 on this issue.

3 So that the Court will know whether or not to report this matter to the State Bar of  
4 Arizona (“Bar”), within 15 days of judgment being entered in this case, each of the  
5 following lawyers shall file a declaration stating whether he or she has or has not reported  
6 this matter to the Bar: James Grant Walker, Lisa Ann Kimmel, Anngelica N Davis, Mandi  
7 Jean Karvis, Ashlee B Hesman, Daniel Patrick Struck, and Kristina R Rood (any referral  
8 must include a copy of this Order). If by this time this issue has been referred to the Bar,  
9 this Court will take no further action because the Bar will perform its own investigation  
10 and take whatever action, if any, it deems appropriate. If this issue has not been referred  
11 to the Bar, within 30 days of judgment in this case, the same lawyers listed above must  
12 each file an affidavit explaining to the Court all terms and timing of the settlement  
13 agreement that in any way involved: 1) the Court: 2) the Court record; 3) notice to the  
14 Court (or lack thereof); and, 4) any orders or actions of the Court. (The financial terms of  
15 any settlement need not be disclosed.). These affidavits shall not be sealed. The Court  
16 will review the affidavits and determine whether to refer this matter to the Bar at that time.

#### 17 **IV. Conclusion**

18 Because all pending motions have been denied and all pre-trial deadlines have  
19 expired, the Court will set this matter for trial. This Court will set due dates for the joint  
20 proposed final pretrial order and related trial documents and motions in limine by separate  
21 order. Accordingly,

22 **IT IS ORDERED** that the reference to Magistrate Judge Boyle is withdrawn as to  
23 this entire case.

24 **IT IS FURTHER ORDERED** that the motion for summary disposition (captioned  
25 as a motion for judgment on the pleadings) (Doc. 68) and the motion for summary judgment  
26 (Doc. 61) are denied.

27 **IT IS FURTHER ORDERED** that all counsel shall confer among themselves and  
28 with their respective witnesses and by May 17, 2022, file a joint notice that proposes at

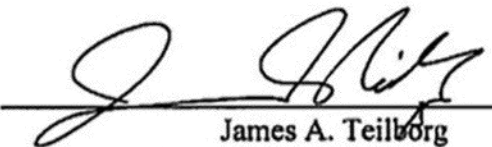
1 least two dates between November 1, 2022 and March 21, 2023 on which they will be  
2 available to begin trial in this case; this joint notice must also include an estimated length  
3 of trial.

4 **IT IS FURTHER ORDERED** that within 15 and 30 days of judgment, each  
5 counsel shall file the information required above regarding candor to the Court.

6 **IT IS FINALLY ORDERED** that because any Bar referral may include prior  
7 counsel on this case, the Clerk of the Court shall send a copy of this Order to all terminated  
8 counsel on this case.

9 Dated this 6th day of May, 2022.

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James A. Teilborg  
Senior United States District Judge